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Resource Law Notes Newsletter, no. 17, Apr. 1989

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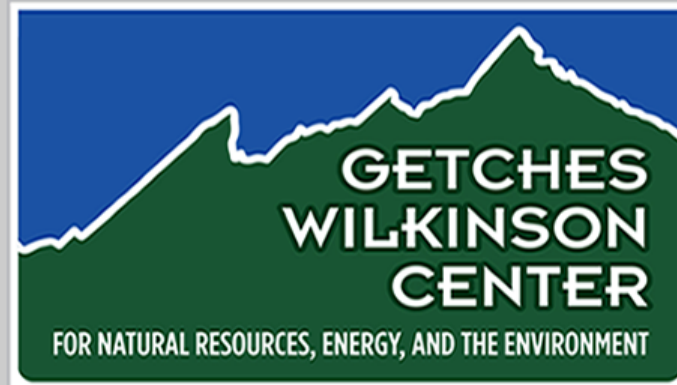
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RESOURCE LAW NOTES: THE NEWSLETTER OF THE NATURAL RESOURCES LAW CENTER, no. 17, Apr. 1989 (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law).

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Resource Law Notes

The Newsletter of the Natural Resources Law Center
University of Colorado at Boulder • School of Law

Number 17, April 1989

Center Announces Associates Program

The Natural Resources Law Center has established a new Associates Program, providing annual membership in the Center. Associate status provides a 20% discount on all full-fee registration charges at Center conferences and on the cost of all Center publications. There are two types of membership—Individual and Firm/Corporate. Firm membership entitles all full-time employees of that firm to take advantage of the discounts. The membership period extends from May 1 to April 30. The Associates fee is \$100/year for the individual membership and \$1,000 per year for the firm or company membership.

Since getting underway in 1982, the Center has greatly expanded the scope and number of its activities. During this period the Center has:

- organized and held 26 conferences and workshops on topics of natural resources law and policy, involving more than 350 speakers and 2,000 registrants;
- conducted 11 major research projects;
- hosted seven Distinguished Visitors and 13 Research Fellows; and
- published three books (with two more available in 1989), 14 Occasional Papers, three Research Reports, course notebooks from 14 conferences, and 16 issues of its newsletter *Resource Law Notes*.

Support for the Center is entirely from gifts, grants, and revenues from Center activities.

For further information regarding the Associates program, please contact Kathy Taylor at (303) 492-1288.



"Flaming Gorge," a watercolor by Ann-Marie Kuczun, is part of a 24-picture series by the artist illustrating the Colorado River. Some of these works will be displayed at the conference *Boundaries and Water*, June 5-7,

June Water Conference on Interstate Issues

Boundaries and Water: Allocation and Use of a Shared Resource is the topic of the Center's annual summer program on water this June. Most of the major rivers in the western United States are shared between two or more states. Often tribal governments play an important role in water allocation and use decisions. International considerations also may be involved in some cases. These interjurisdictional issues extend to groundwater as well as surface water.

This conference will provide the essential legal framework regarding the interjurisdictional allocation and use of water. Seven important river basins will be examined to illustrate the issues involved in sharing a resource among different governmental entities and the legal and institutional responses which have developed to accommodate these different interests. The topic of interstate and interbasin transfers will be given special attention. Finally, opportunities for improved

cooperation will be considered.

Monday, June 5, 1989

AM LEGAL PRINCIPLES AND ISSUES

8:40 *Allocation of the Nation's Rivers: the Constitutional Framework*, Prof. Charles F. Wilkinson

9:40 *Allocation of International Rivers: Developments in International Law*, Prof. Daniel B. Magraw

10:20 *Interjurisdictional Water Quality Issues*, Prof. Michael C. Blumm

11:00 *Interjurisdictional Groundwater Allocation: Emerging Principles and Policies*, Ann Berkley Rodgers

12:00 Lunch speaker: David LaRoche, International Joint Commission

PM BASIN STUDIES

1:15 *The Colorado River Compact: A Breeding Ground for*

International, National and Interstate Controversies, John U. Carlson

2:05 *Managing the Upper Rio Grande: Old Institutions, New Players*, Steven J. Shupe

3:15 *Interstate Allocation of the Platte River*, Prof. J. David Aiken

4:05 *The Arkansas River Controversy*, David W. Robbins

6:00 Cookout on Flagstaff Mountain

Tuesday, June 6, 1989

AM BASIN STUDIES (cont.)

8:45 *Coordinated Water Management in a Basin with Erratic Surface Supplies: the Law North and South of the Pecos*, Prof. Charles T. DuMars

9:35 *The Delaware River Basin: Courts, Compacts & Commissions*, R. Timothy Weston

10:45 *The Missouri River: River of Promise or Peril?* John E. Thorson

PM INTERJURISDICTIONAL TRANSFERS

1:05 *Unique Legal Issues Raised by Long Distance Water Transfer Proposals: ETSI, the Columbia River, NAWAPA*, Prof. Ralph W. Johnson

1:50 *ETSI Pipeline: the Future of an Illusion*, William Janklow

2:35 *State Resource Sovereignty in a Post-Sporhase World: the Case of the Hueco Bolson*, Prof. A. Dan Tarlock

3:40 *Montana's Response to Interjurisdictional Marketing Challenges*, Deborah Beaumont Schmidt

4:15 *Marketing of Indian Reserved Water Rights*, Jeanne Whiteing

Wednesday, June 7, 1989

AM INTERJURISDICTIONAL COOPERATION

8:45 *Integrating Interstate and Federal Natural Resource Policy in the Pacific Northwest: The Northwest Power Planning Council*, John M. Volkman

9:30 *The Northwest Power Planning Council—A Model for Cooperative Planning in the Missouri Basin?* Gerald Mueller

10:35 Panel: *Opportunities for Cooperation in the Missouri Basin*, David L. Pope, John E. Thorson, Arvid L. Thomsen

12:00 Lunch speaker: Bruce E. Babbitt

1:10 *Opportunities for Cooperation in the Colorado River Basin*, Prof. David H. Getches

Panel: Maggie Fox, Linda Lazzerino, J. William McDonald

3:00 Adjourn

Burlington Resources Fellow Position Available for 1989-90

The Center is again pleased to announce that the Burlington Northern Foundation (representing Burlington Resources, Inc., El Paso Natural Gas Co., Meridian Minerals Co., and Meridian Oil Inc.) has funded the position of **Burlington Natural Resources Law Fellow**. This program, which carries a stipend of \$20,000, was successfully inaugurated in 1988-89.

The Center is seeking applicants for this position for either Fall or Spring semester 1989-90. The Fellow will spend a semester in residence at the School of Law, researching a topic concerned with **energy, mineral, or public land law**. Emphasis is on legal research, but applicants from law-

related disciplines, such as economics, engineering, or the social sciences, will also be considered. While in residence Fellows will participate in activities of the Law School and the Center and will have opportunity to discuss their work with faculty and students in both formal and informal sessions. Fellows are expected to produce some written work suitable for publication by the Center.

In addition to the stipend of \$20,000, secretarial and research assistance is available.

Candidates should apply by letter by **May 15, 1989**, outlining the nature of their research interest, the time when they wish to come, and a brief statement of their qualifications. Letters should be addressed to Professor David H. Getches, University of Colorado School of Law, Campus Box 401, Boulder, CO 80309-0401.

In addition to the Burlington Resources Fellowship, the Center continues to welcome applicants to its Fellows Program in all areas of natural resources law, and related disciplines. These fellowships offer very modest financial support, appropriate to those with some support from their home institution, such as academics or attorneys on sabbatical. If you wish more information about any aspect of the Center's Fellows program, write to Lawrence J. MacDonnell, Director.

Global Change and International Law: February Program Addresses Climate Change



Prof. Daniel B. Magraw

Global warming, or more comprehensively global change, was the subject of a Law School conference February 1-2, cosponsored by the Center, along with the Nicholas R. Doman Society of International Law, the American Society of International Law, and the International Environmental Law Committee of the ABA Section of International Law and Practice.

University of Colorado Law Associate Professor Daniel B. Magraw organized the colloquium, which examined international laws governing those human activities which tend to affect the climate and biosphere, such as burning fossil fuels and clearing rain forests. The conference discussed how customary law and treaties to curtail deleterious effects could be applied equitably to Third World countries where development is often essential to survival. The program featured speakers from the Soviet Union, the People's Republic of China, and the United Nations, and attendees from several other countries.

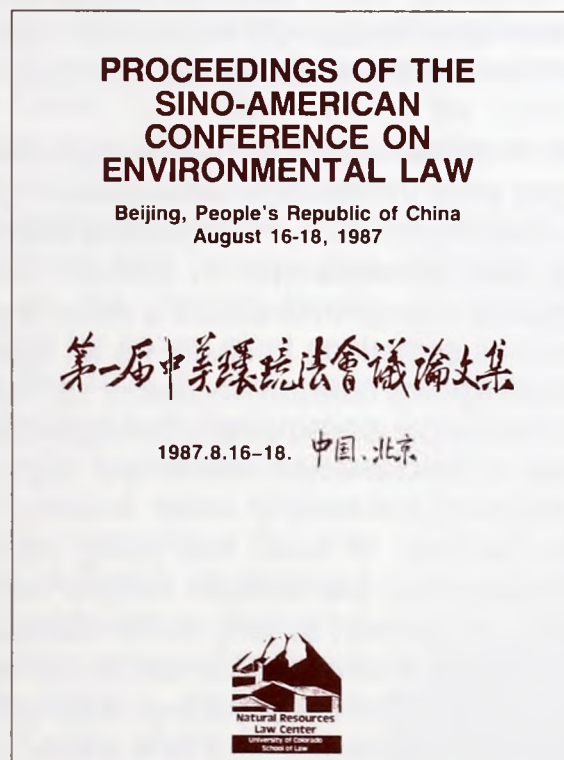
New Center Advisory Board Members Named

Eight new members joined the Center's Advisory Board in January. Added were **Dr. Philip E. Austin**, President, Colorado State University; **Bruce E. Babbitt**, former governor of Arizona and partner, Steptoe & Johnson, Phoenix; **Dr. John A. Cordes**, Dean of the Graduate School, Colorado School of Mines; **Charles A. Margolf**, Vice President, Colowyo Coal Company; **Lorraine Mintzmeyer**, Rocky Mountain Regional Director, National Park Service; **Kenneth Salazar**, Counsel to the Colorado Governor; **William D. Schulze**, Professor of Economics, University of Colorado; and **Karin P. Sheldon**, Senior Counsel, The Wilderness Society. In addition, **Clyde O. Martz**, of the Denver firm of Davis, Graham & Stubbs, rejoined the Board. Mr. Martz served as chair of the Board between 1981 and 1986.



Bruce E. Babbitt, former governor of Arizona and new member of the Center's Advisory Board, will present the luncheon talk at Boundaries and Water, June 7.

Two New Center Publications Available



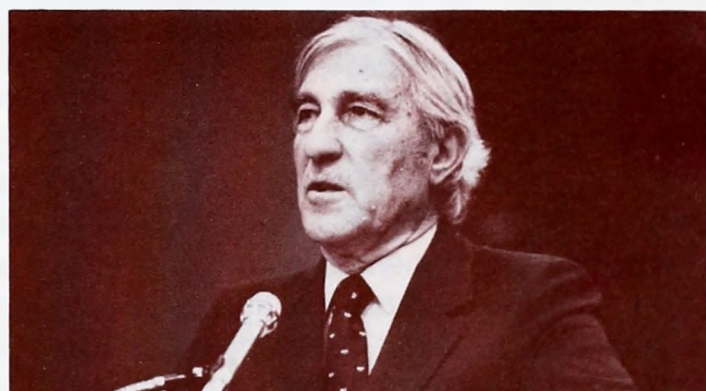
Proceedings of the Sino-American Conference on Environmental Law has now been published as a book. This book contains papers prepared in connection with a conference on

Chinese and U.S. environmental law held in Beijing in August 1987. There are thirteen papers by Chinese authors providing perhaps the most comprehensive treatment presently available regarding the rapidly developing systems of environmental law in China. The nine U.S. papers address the major aspects of the American system of environmental law. This book is available for \$10 from the Center.

A new Center Occasional Paper, "Transferring Water Rights in the Western States—A Comparison of Policies and Procedures," is now available. Authored by **Bonnie Colby**, **Mark McGinnis**, **Ken Rait**, and **Richard Wahl**, this 90-page document contains a detailed description of the procedures involved in changing a water right with special reference to Arizona, Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming. Transfers of Bureau of Reclamation-supplied water also are treated. This report is available for \$12.

Udall is 1988-89 Moses Scholar

Stewart L. Udall was the Law School's **Raphael J. Moses Natural Resources Scholar** this year. Mr. Udall visited the Law School January 24-27, 1989, as the Moses Scholar. He lectured to classes on Indian law, water resources, and advanced natural resources and met informally with students, law faculty, and other faculty from the Boulder campus. He delivered a public lecture, "Reflections on the Ecological Revolution," and served as keynote speaker for the second annual National Association of Environmental Law Societies conference, held at the University of Colorado January 26-28.



Stewart L. Udall

Mr. Udall served as Secretary of the Interior under Presidents Kennedy and Johnson between 1961 and 1969. Prior to that, he had been a Congressman from Arizona. He has authored several books, including *The Quiet Crisis* (a best seller in 1963; an updated version is coming out soon), and numerous articles related to environmental concerns and other issues. His most recent work, *To the Inland Empire: Coronado and the Spanish Legacy* (1987) celebrates Hispanic contributions to our history.

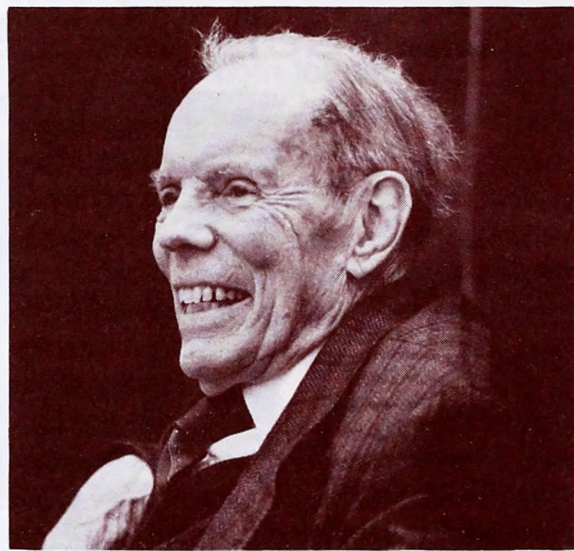
The Raphael J. Moses Natural Resources Scholar was established at the University of Colorado School of Law in 1988. **Clyde O. Martz** served as the first Moses Scholar.

Saunders is 1988-89 NRLC Distinguished Visitor

Glenn G. Saunders, a founding partner of the Denver law firm Saunders, Snyder, Ross & Dickson, was the Natural Resources Distinguished Visitor at the University of Colorado School of Law, February 15-16, 1989. Saunders was counsel to the Denver Water Board for much of his legal career, which began in 1929.

During his visit, Mr. Saunders spoke to students in Professor Wilkinson's advanced natural resources seminar and in Professor Getches' water law class. A reception was held in his honor at the School of Law on February 15.

Mr. Saunders recently authored the Center Occasional Paper, "Reflections on Sixty Years of Water Law Practice." The second part of this paper appears in this issue of *Resources Law Notes*.



Glenn G. Saunders addresses water law class.

New Roles for the Bureau of Reclamation

Richard W. Wahl*

In 1987 a rather remarkable thing happened: the Bureau of Reclamation, the federal agency charged with constructing water facilities and multi-purpose dams in the western states, issued a short report indicating that its mission should change. The *Assessment '87* report indicated that



The Bureau's primary role as the developer of large federally financed agricultural projects is drawing to a close... The Bureau of Reclamation must change from an agency based on federally supported construction to one based on resource management.

The report goes on to discuss some ways in which the Bureau could facilitate more efficient resource management, such as improved systems analysis of multi-reservoir systems to enhance their dependable yield, nonfederal operation of Bureau facilities, transfer of title of facilities to water districts, developing a water marketing policy to allow contractors to sublease water at a profit, and increased roles in the areas of groundwater management and water quality.

How seriously should one take these claims? Some critics of the Bureau feel that the report was largely a public relations campaign and that the agency would proceed with business as usual. Indeed, although *Assessment '87* indicates that

... in some ways the Bureau has already seen some changes since the issuing of Assessment '87.

"decades-old legal authorities and policies based on the Bureau's traditional role in the West must give way to new laws and policies which encourage efficient resource management," no package of general amendments to Reclamation legislation has been forthcoming and, therefore, the financial and regulatory framework of the program remains essentially unaltered. Too, it would be difficult to expect the personnel making up the agency, with specific training in dam design and construction, to easily accommodate a different role.

However, in some ways the Bureau has already seen some changes since the issuing of *Assessment '87*. It moved most of its Washington, D.C., headquarters staff to join the Engineering and Research staff in Denver. Although not guaranteeing any change in direction, a move of such major proportions does something to shake up an agency. On a more substantive policy note, on December 16, 1988, the Department of the Interior issued a set of principles designed to guide Bureau of Reclamation review and approval of requests for voluntary transfers of water involving Bureau of Reclamation facilities. In brief, this policy says that the Bureau of Reclamation will facilitate transfer requests that are brought to the agency, so long as the transfers comply with applicable state and federal law and do not injure third parties (parties other than the buyer and seller of the water). Transfers may be short-term or long-term leases, permanent sales, or dry-year option agreements. The policy also makes clear that, beyond the water user repayment required by

* Dr. Wahl has been a member of the economics staff for 10 years in the Office of Policy Analysis of the U.S. Department of the Interior. He was a Visiting Fellow at the Natural Resources Law Center during the fall semester, 1988, where he worked on the Center's project on market transfers of water. The views in this article are those of the author and do not necessarily reflect the views of the Department of the Interior. This article is drawn, in part, from the author's book *Markets for Federal Water: Subsidies, Property Rights, and the Bureau of Reclamation*, to be published this year by Resources for the Future.

federal contracts and law, the federal government does not intend to burden such transfers with additional federal charges—the transferring parties are free to work out the financial terms of the transaction.

This water transfer policy may be the first substantive policy redirection of the new Bureau. However, this policy can also be seen as resulting from a gradual evolutionary process, rather than a sudden or significant departure from past agency practice.

Evolution of Reclamation Law

The Bureau of Reclamation was established by the Reclamation Act of 1902 to provide irrigation water supplies on landholdings of 160 acres or less. The social goals of the program were to assist in settling the arid west with small family farms. However, almost immediately, the water supplies were seen as valuable for other uses. In 1906 the Town Sites Act authorized the Secretary to contract for the sale of water to towns or cities in the immediate vicinity of irrigation projects, and to lease surplus hydropower (not needed for irrigation pumping) for municipal and other uses, provided that the leases not “impair the efficiency of the irrigation project.” An even more general authority to contract for water from irrigation projects for purposes other than irrigation was provided by the Miscellaneous Purposes Act of 1920. For a somewhat different purpose, the Warren Act of 1911 allowed the Secretary of the Interior to contract out excess project capacity to nonproject individuals, districts, and associations for the purpose of storing or transporting nonproject water. So, even in the early years of the program, reallocating project water and facilities from irrigation uses to other newly developing uses was seen as important for western development. The current attempt to clarify the rules under which water that is already under contract can be transferred to new uses can be seen as furthering the same goal.

Past Water Transfer Activity

The Bureau has been a party to transfers of water for many years. Annual rentals of water from the federal reservoirs on the Upper Snake River date back to the 1930s and are explicitly recognized in Bureau of Reclamation contracts with water users. In 1972, the Utah Power and Light Company obtained 6,000 acre-feet of water from two irrigation companies in the federal Emery County project for power plant cooling. During the 1976-77 drought in California, the Bureau of Reclamation operated a water bank in which some 45,000 acre feet of water changed hands for total payments of \$2.2 million. The City of Casper, Wyoming, is paying the nearby Casper-Alcova Irrigation District for canal lining on portions of the district's fifty-nine-mile canal and 190-mile lateral system in order to reduce seepage. The exchange is intended to provide the city with 7,000 acre-feet of water. One of

the most notable examples of a functioning water market is in the Northern Colorado Water Conservancy District around the Ft. Collins area, where shares of Colorado Big Thompson Project water have, for years, been sold at market value.

Perhaps the most dramatic recent examples of water transfers are the agreements reached between the Imperial Irrigation District and the Metropolitan Water District of Southern California. Imperial diverts about 3 million acre feet annually of Colorado River water, which represents nearly 25% of the total diversions from the river. In the fall of 1988, Metropolitan and Imperial reached an agreement under which Metropolitan will pay Imperial to fund conservation measures within the irrigation district that would salvage 100,000 acre-feet of water annually for diversion to Metropolitan's service area. Metropolitan will pay Imperial \$92 million for construction of the conservation facilities, \$3.1 million annually for operation and maintenance, and \$23 million in five annual installments for indirect costs. The same two entities reached a separate agreement under which Metropolitan can fund lining of the earthen All-American Canal (a federally constructed facility which transports water from the Colorado River to the irrigation district) in exchange for the conserved water. Both state and federal studies indicate that there is potential for at least another 100,000 acre-feet of conservation within Imperial—which may provide the basis for future agreements between the two entities.

The Larger Context

Because of the extensive facilities of the Bureau in the seventeen Western states, similar transfers are likely to be important to the future development of these states. The Bureau supplies about 27 million acre-feet of water for irrigation annually, about 3 million acre-feet for municipal and industrial use, and about 1 million acre-feet for other uses. Irrigation water is delivered to about 10 million acres of farmland. Although this represents, on average, only about 20% of the irrigated acreage in these states, the Bureau delivers water to more than 40% of the irrigated acreage in some states. However, these figures may under-represent the potential importance of the Bureau of Reclamation in water transfers since the Bureau controls major storage and



"Glen Canyon Dam," a pastel by Ann-Marie Kuczun, illustrates one project of the Bureau of Reclamation.

... irrigation water users are responsible, on average, for paying less than 15% of irrigation construction costs.

conveyance facilities in several states (such as the Central Valley Project in California and the Central Arizona Project).

The impetus for such voluntary transfers is not surprising for another reason. Contracts for project water deliveries confer a property interest to the Bureau's water contractors. Given the terms of the Reclamation subsidy for irrigation, these rights are quite valuable. Under Reclamation law, repayment for construction costs is interest-free over 40-years. In addition, since 1939 there has been a statutory provision that repayment by water districts can be capped at their estimated "ability to pay," based on an analysis of expected farm income. The result of these two provisions is that irrigation water users are responsible, on average, for paying less than 15% of irrigation construction costs. The benefits of this subsidy enhanced agricultural income or became incorporated into the higher value of irrigated land when parcels of project land were resold. Therefore, the contractual rights to water deliveries are property interests of the current landowner, and it is not surprising to see water-user support for the transferability of these interests.

Potential for Future Water Transfer Activity

What type of future water transfers are we likely to see? Of course, the conditions which create the economic demand for transfers are going to vary from one situation to another and would not be possible to predict. In fact, that is the point of facilitating transfers—project planners cannot accurately predict the patterns of economic development and water demands 100 years into the future (the typical planning horizon for Bureau projects). But, based on past experience and transfers currently under consideration, one can expect transfers to be useful in the following general situations. Where there is increasing urban growth, purchases of water from agricultural uses are likely to be an inexpensive source of supply, as is payment for irrigation conservation measures. Agricultural producers with high value or perennial crops will be willing to purchase water from other agricultural users, especially during drought periods.

One could also speculate on some potential future situations where transfers might prove useful, even though they have not been employed to date. In areas where agricultural drainage is found to cause problems of contamination (such as the selenium poisoning in the Kesterson National Wildlife Refuge), sale of the irrigation water and removing from production the irrigation lands with severe drainage problems will be one way to achieve a better use of the water and land resources, as well as providing compensation for farmers. Meeting the water demands and the international treaty requirements with Mexico on the Colorado River will place increasing demands on water use in that basin. Water transfers

based on already established compact allocations and water contracts may eventually prove to be one way of assuring the most efficient use of water in this arid region, while still protecting previously established property interests.

Other Changes in the Bureau

Besides issuing a policy on water transfers, what other actions have been taken by the Bureau that would indicate the agency's seriousness about the various initiatives proposed in *Assessment '87*? As noted, the report places emphasis on transferring greater control over and responsibility for operation and maintenance of existing projects by water users. There are some recent notable examples: districts along the Friant-Kern Canal, the Madera Canal, and the Tehama-Colusa Canal in the Central Valley Project in California have taken over responsibility for operation and maintenance of these facilities. The districts were motivated by an interest in greater control over project works. In addition, they believe they can operate the facilities at lower cost than the Bureau of Reclamation. These actions were initiated before the issuing of *Assessment '87* and extend the Bureau's long-standing policy of transferring operation and maintenance responsibilities to water users.

... the report places emphasis on transferring greater control over and responsibility for operation and maintenance of existing projects by water users.

The additional step of transfer of title to facilities is a new initiative. Already, some California districts have expressed interest in prepaying their remaining repayment obligation in order to take title to project facilities. Most such cases require case-by-case approval by Congress, and legislation for the California districts is pending. In a somewhat different vein, the Bureau took steps in 1988 to sell some of its financial assets to water users—the outstanding loans under its various loan programs. Such a program could be logically extended to the outstanding repayment obligations for project construction or could be coupled with transfer of title to facilities.

Conclusions

Given the disruption accompanying the Bureau's move to Denver and the accompanying staff reorganization, it may take some time for other initiatives to emerge from the Bureau that will move it in the new directions set out in *Assessment '87*. As is the case with the actions taken to date, these other changes are likely to be ones not so much initiated by the agency as ones arising from the demands of the Bureau's client water users, as well as the larger forces leading to changes in the way the western states manage their water resources.

Reflections On Sixty Years of Water Law Practice

Glenn G. Saunders*

This is the second in a 3-part series by Glenn Saunders. The first section was published in "Resource Law Notes" #16, January 1989. For a copy of this issue, call or write the Center.

Water Exchanges

Denver has been innovative in developing Colorado water law in a number of respects. An example is securing a decree for exchange of water using the natural stream and its waters as a basis for moving water up and down a natural water-course. Recognizing the fungibility of the waters of natural streams, the statutes since the nineteenth century authorized the use of these waters as a vehicle for trading water placed in a stream at one place and removing a like amount at another. With the increasing demand for use of natural stream water for exchanging flows, it became apparent several decades ago that conflicting demands would mean that all desired exchanges could not sometimes be made.

Denver believed that using the water of a natural stream for exchange was a beneficial use for which a prior right could be secured. Consequently, before others began the practice, Denver secured a prior right to use natural stream waters for exchanges necessary for the proper operation of its systems. Since Denver secured the first decree giving a prior right to use water for exchange purposes, decrees for this purpose have become quite common.

Issues Concerning Water Development

Although one would expect the United States government to be trying to help all of the citizens of the United States, some of its agencies have perennially opposed Denver's development of a water supply. Its witnesses testified many years ago that the waters being appropriated from the tributaries of the Colorado River were not needed by the people of Denver, and figures were brought together, particularly by one Randy Riter of the U.S. Bureau of Reclamation to show that Denver's population growth would not be as projected by the Denver Water Department. The Denver Water Department predictions have been entirely corroborated by actual events over the last 50 years (1935-1985).

It is not surprising that the estimates of water need have been accurate. The principal bases of these estimates have been long-range projections by business interests in the community which invest their money and thus put it at risk on the basis of accurate determinations of the population that must be served. Not only does the Water Department make its own projections, but also the gas and electric utility, the telephone utility, and the voluntary organizations of commerce and industry. The estimates of growth in 1988 have been challenged by environmental groups opposed to changing the natural environment by conserving Colorado's rivers for human consumption. The highly developed civilization, not only urban but agricultural and industrial, which has been created by taking waters from natural streams for conservation, leads the beneficiaries of this civilization to forget that the loss of natural flow of rivers has made it possible to live in a civilized environment. Also overlooked is the fact that Eastern Slope rivers such as the Platte and the Arkansas supported a very limited irrigation community until reservoirs were built to store spring floods for use later in the summer.

Benefits of Storage

An example of the great benefit of conservation by storage is the case of the South Platte River. By building reservoirs in the mountains, Denver has made it possible to have a year-round supply of water, much of which is used to create the beautiful environment of trees, shrubs, flowers and lawns which now characterizes the city which was once a near desert. The water thus used percolates back rather slowly into the South Platte River above most of the irrigation which is below Denver along the Platte River on into Nebraska. In later years, the construction and operation of the Big Thompson project by the Bureau of Reclamation has had the same effect, but not quite so effectively because it is farther down stream than Denver.

In the early days, the South Platte went dry in August or September, . . .

Together, these projects, as well as the project of Aurora bringing outside water into the Platte River and bringing storage water as well, have created a continuous year-round flow of water in the South Platte River. In the early days, the South Platte went dry in August or September, and there was no nesting ground either in Colorado or Nebraska for migrating birds. There simply wasn't any water. Bird habitat was injured by the floods of spring which tended to channelize temporarily and then be gone. After a hundred years of urban and irrigation development, the Platte River is now a haven, not only for people but for birds and waterfowl. Every new project, such as the Two Forks Reservoir, for which there is a water supply tends to increase this bounty.

The Williams Fork Project

A different phase of the development of the Denver water system relates to its Williams Fork project. During the Depression of the 1930s, all governmental agencies were working to find ways of putting the economy back in motion. Cities, states, and principally the federal government, promoted public projects. One of the ways of doing this was through the Public Works Administration under which the United States would provide a percentage of the cost of a local public project. The Denver Charter requires that the entire cost of the operation of the Denver water system be paid from rates charged to consumers. And it had always been so. But there is nothing in the Charter to prevent accepting gifts.

Denver's Williams Fork project provided for a tunnel from the Williams Fork River, which is a tributary of the Colorado River, into Clear Creek, which is a tributary of the South Platte River. During this period, Denver was beginning to have problems with the treatment of its sewage effluent. One of the potential methods of treatment was to provide high quality water to dilute sewage as it entered the South Platte River. While the waters of the Williams Fork had already been

* Attorney, Saunders, Snyder, Ross & Dickson, Denver

appropriated for all municipal purposes, the work of building a collection canal system and a tunnel under Jones Pass from the Williams Fork River to Clear Creek was still in the survey and design stage.

The idea developed to use an abandoned canal called the White Cap which ran from Clear Creek to a point on the Platte River where its outfall would mingle with various raw sewage outfalls in Denver before the polluted water would have to be used by others.

Denver had the good fortune that its outstanding engineer, George Bull, had been selected by the United States government to approve various public works projects for a region including Colorado. His offices were in El Paso, Texas. Denver Water Board personnel presented to him a plan for immediate completion of the design of the Williams Fork system and its construction to meet the dilution water requirements of the State Health Department. It took no long explanatory process to convince Mr. Bull because he was already familiar with the program, having himself originally designed the outlines and assisted in the preparation of the appropriation filings.

During the construction for the project, the standards for sewage treatment were raised considerably so that mere dilution was no longer adequate. So the question of whether dilution of sewage is a beneficial use of water did not receive a judicial determination. But the physical system had thus been put into operation so as to bring water from western Colorado to the Platte River basin for customary beneficial uses. Instead of using the White Cap Canal, it was found economically feasible to drive the Vasquez Tunnel from Clear Creek into the Moffat Tunnel system, thus combining the waters of the Williams Fork River with those of the Fraser River for use in the Denver water system. Because these steps were purely mechanical and did not change the ultimate purpose for which the water had been appropriated, no court proceedings were required for their consumation.

The "Metro Sewage" Decision

To accommodate Denver's need to recycle its sanitary sewage so as to make it meet acceptable standards, it became necessary to move the place of return of Denver's sewage effluent from above a major ditch to a point below that ditch. After the change, the ditch would no longer receive the

volume of the return flow. The ditch company contested the right of Denver to make this change, but the Supreme Court in *Metropolitan Denver Sewage Disposal District No. 1 v. Farmers Reservoir and Irrigation Company*, 179 Colo. 36, 499 P.2d 1190 (1972), held that Denver, as the appropriator of the water which went through the sanitary sewers was not obligated to continue its early practices of returning such water to a natural watercourse at the same place as it had historically.

Developed Water

There is a type of water outside the "natural stream" water referred to in the constitution. That is water opened up by man's activities, such as mining, which would not otherwise be part of a natural stream or nontributary aquifer: developed water.

I conceived this developed water concept in the case of *Pikes Peak Golf Club Inc. v. Kuiper*, 169 Colo. 309 455 P.2d 882 (1969). In this case, one Roy Pring transformed an area underlain by impervious shale from a place where practically all of the water was consumed by plant life. Only occasionally did any spill into Fountain Creek, a tributary of the Arkansas River, so that 240 acre-feet of water annually was consumed on the parcel itself, an amount which never reached Fountain Creek. By draining the swampy area and husbanding the water very carefully, a golf course was created and, for the first time, substantial amounts of water spilled into Fountain Creek. The State Engineer claimed this water for appropriators on Fountain Creek and ordered the golf course to cease its operations and effectively deliver the 240 acre-feet that had formerly been consumed by plant life and evaporation, to water users on Fountain Creek. The Supreme Court held that the 240 acre-feet of water was not tributary water historically and therefore not subject to administration by the State Engineer under the priority system.

Salvaged Water

A distinction must be made between developed water and salvaged water. Developed water is water which was never part of a natural water course or the tributary ground water which is really part of a surface stream. Salvaged water is that which has been part of a natural stream or might become a part of such a stream but for changes brought about by the act of man.

The leading case regarding salvaged water is a decision written by Justice Edward C. Day, noted for his practical horse-sense approach to solving legal problems, in the *Shelton Farms Case*. (*Southeastern Colorado Water Conservancy District v. Shelton Farms*, 187 Colo. 181, 529 P.2d 1321 (1974)). It is well known that salt cedars in the bed of the Arkansas River, muchlike cottonwood trees, evaporate large amounts of water from the stream in which they are located. In the *Shelton Farms* case, landowners who removed salt cedars from their lands claimed a right to the saving to the stream brought about by such removal. This was clearly not a new source of water and any attempt to define it or administer it so as not to



Williams Fork Spillway. Photo courtesy of the Denver Water Board.

injure senior appropriators of water would have been next to impossible. The Supreme Court rejected the salvage idea.

Recently, a retired Forest Service employee by the name of Red Giffen, wrote a letter to the editor of a Denver newspaper pointing out that in heavily forested areas very little of the precipitation, whether it be snow or rain, ever reaches the ground so as to get into the flowing streams. He pointed out that careful cutting of timber could result in much more water reaching flowing streams. Such cutting would leave stands of timber adjacent to clear cut areas where small, newly growing trees would not keep precipitation from reaching the ground. Such a procedure over wide areas could produce substantially more water in natural streams. The article did not note the cost of this type of timber operation or of replanting. Those costs would have to be weighed against the cost of cloud seeding in areas tributary to natural streams but where heavy timber cover would not prevent the precipitation from reaching the streams. Such procedures seem to be far in the future when the population of the United States increases to the point where water supplies become a desperate necessity.

The "Vidler" Decision: The Question of Speculation

On the basis of distinguishing between "speculation" and "appropriation," the Supreme Court has recently indicated that unless an appropriator knew where he was going to put the water, had a market for it, and could demonstrate that he had the water, he could not make an appropriation. This is the decision in *Colorado River Water Conservation District v. Vidler Tunnel Water Co.*, 197 Colo. 413, 594 P.2d 566 (1979). Within 60 days of this decision, the Colorado legislature passed definitive legislation to provide guidelines reaffirming the conditional decree statutes. (Colo. Rev. Sections 37-92-103(3)(a) and 305(9)(a) and (b) (1973 and 1988 Supp.).

In an earlier case (*Taussig v. Moffat Tunnel Water and Development Co.*, 106 Colo. 384, 106 P.2d 363 (1940)), an appropriator from the tributaries of the Fraser River had simply said that he wanted to use the water in eastern Colorado, where he knew there was need for a supply. A decree for this appropriation was affirmed.

Under the earlier philosophy, the Highline Canal, 150 miles in length, was built by English capital to serve land which had not yet even been patented and in which the settlers had not yet arrived to ultimately become water users. Appropriation was confirmed after settlers arrived, patented the land and put the water to use. *Wheeler v. No. Colo. Irr. Co.*, 10 Colo. 582, 17 P. 487 (1888).

The four year requirement of a showing of due diligence was expected to weed out the speculators . . .

As has been correctly stated by the Supreme Court on several occasions, any water developer, whether public or private, could not well afford to make great expenditures of money in the development of a water resource in the present day without the assurance of a decree to entitle the developer to the water proposed to be put to beneficial use. It has always been recognized that such a decree, for its final effective-

ness, would be dependent on completing the appropriation with due diligence. To assure that the proposed appropriator was not merely speculating, but really intended to—and had the means of—completing his project, it was required that a showing be made every four years, in the case of a project taking many years to develop, that the proposed appropriator was diligently pursuing his appropriation. The four year requirement of a showing of due diligence was expected to weed out the speculators who might simply be attempting to tie up the water supply of a stream in the hope of someday finding a way to make use of the water. *Vidler* appeared to be a change of philosophy on the part of the Supreme Court from its philosophy in *Taussig*. However this may be, the definitive statute passed shortly after the decision in *Vidler* furnished the criteria on which future decisions of developers and courts must be based. This assumes, of course, that the legislature has the law-making power under our constitution and the Supreme Court is bound to follow the laws as passed by the legislature regardless of any personal views.

The Statutory Response to "Vidler"

Rather than further examination of *Vidler*, we therefore should look at the new statute. Passed in 1986, the first thing to be noted is that the statute ratifies the granting of conditional decrees. In Colo. Rev. Stat. 37-92-103(3)(a) (1973 and 1988 Supp.), we find the words "but no appropriation of water, either absolute or conditional, shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation, as evidenced by either of the following: . . ." Reference to "either absolute or conditional" is a clear ratification of the long-standing practice that decrees for uncompleted appropriations are to be given, conditioned on ultimate appropriation of the water for beneficial use. The language then goes on to give the courts criteria, not for due diligence, but only for what is considered to be a speculative appropriation.

The first criterion for what is to be considered speculative is that the purported appropriator does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, unless the appropriator is a governmental agency or an agent-in-fact for the persons proposed to be benefitted by the appropriation. First, we note that this language grants a special preference to a governmental agency or one who is an agent-in-fact for the persons proposed to be benefitted by the appropriation. Section 6 of Article XVI of the Colorado Constitution militates against any special preference with the words "the right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."

Next, it must be noted that the Highline Canal of the *Wheeler* case could not have secured its date of appropriation, because the builders not only had no vested interest in the lands to be served, but the settlers had not even arrived.

On the other hand, the second alternative may save the situation. That alternative provides that the purported appropriator of record must have a specific plan and intent to divert, store or otherwise capture, possess, or control a specific quantity of water for specific beneficial uses. This language brings us back almost to *Taussig*, but not quite. In *Taussig*, the appropriator really had a general plan of carrying water from tributaries of the Fraser River and the Colorado River watershed for beneficial use somewhere in the South Platte River watershed where there was already a sufficient short-

age of water that there was a practical certainty that someone would make beneficial use of the water once it arrived in that watershed. A change in the statute requires a specific plan which would necessarily require a fairly close definition, not only of the source of water, but particularly as to the place and character of use. The facts in the *Wheeler* case should meet this criterion.

This language requires an appropriator to have the gift of prophesy.

While it has always been well-established that the Constitution authorizes appropriation for use and not for speculation, as found in Supreme Court decisions, there had been no legislative definition of speculation until 1979 with the adoption of Colo. Rev. Stat. Section 37-92-103 (3)(a) (1973 and 1988 Supp.). The language of the statute is somewhat uncertain in that it says that “. . . no appropriation of water . . . shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights . . .” This language would not specifically eliminate appropriation by an individual who did not propose to sell or transfer the water, but was personally speculating as to how he might apply the water to beneficial use. Such a concept may have little practical relationship to present-day conditions because appropriations today are made on a relatively large scale with a view to application to beneficial use of the waters appropriated by many individuals.

In 1979, the legislature added a new concept in a provision found at Colo. Rev. Stat. Section 37-92-305(9)(b) (1973 and 1988 Supp.) with these words:

No claim for a conditional water right may be recognized or a decree therefor granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time.

This language requires an appropriator to have the gift of prophesy. It is the word “established” which, if literally applied, would make further appropriations impossible. When it comes to the actual application of this word, the judiciary will probably relate the word “established” to the concept of burden of proof. This would mean that if the evidence made it reasonable to assume that there would probably be water available and that the “specific plan” referred to at Section 37-92-103 (3)(a)(II) (1973 and 1988 Supp.) appears by competent evidence to be supported, a decree can be granted.

The McCarran Amendment

The National Reclamation Association (NRA) was a voluntary group of representatives of all the reclamation states, that is, those relying on the appropriation of water as the basis of their social fabric. The Board of Water Commissioners of Denver, which had all the powers of the city respecting the management and operation of a waterworks system and plant, strongly supported the NRA. Because of this, as an attorney for the Board, I held a long tenure on its Resolutions Committee. One of the most active programs of NRA was to integrate the United States claims for water into the water

rights systems of each of the reclamation states.

Working under the auspices of the NRA, I prepared what was known as the Barrett Bill, so named for the Wyoming representative in Congress who introduced the bill. This bill simply provided that the United States could only acquire water in any state pursuant to the laws of that state. This comports with the Reclamation Act, which says that, with respect to its reclamation projects, the United States must acquire water under state law.

The concept gradually filtered through to the members of Congress so that, in 1952, Senator McCarran of Nevada attached the substance of the matter to another bill as an amendment. When Senator McCarran brought the matter to where there was going to be a real hearing and a recommendation to the Senate with respect to the concept, I received a telephone call from Judge Sturrock from Texas, who was active in the National Reclamation Association. He said that the time had come for me to get to Washington and support the association's viewpoint. In these hearings, my adversary was Bill Veeder, a Colorado lawyer who practiced law in Colorado Springs but left there to work for the U.S. Department of Justice. He is the one who started the *Santa Margarita* cases in California (which nearly caused a revolution), a very dedicated public servant for the United States and a true believer that the United States should supersede the powers of all individual states. He would never have voted even for a confederacy. He believed in the dominant federal government and made the case for the federal agencies before the Senate Committee, saying that the United States had so many water rights that it would take several years to prepare to present these cases for adjudication. Thirty-five years later, the Department of Justice is making the same plea in cases for adjudication of water rights and asking for postponement because they have not had time to find out what they needed or what they wanted.

Need for the McCarran Amendment

The necessity for integrating U.S. water claims into the state administration system was emphasized by the Colorado Supreme Court, whose Chief Justice Stone said in *Denver v. Northern Colorado Water Conservancy District*, 130 Colo. 375, 414, 276 P.2d 992, 1011-12 (1955):

Water rights cannot in fact be adjudicated as to part of the claimants only. They are relative both as to time and amount. None is certain unless all are determined. If the contention of Government immunity be true, then all the many water adjudication proceedings in Colorado and elsewhere in which the rights of the United States have been submitted by its officers and have been adjudicated by the court have resulted in decrees void as to the United States and therefore uncertain as to the rights of all other parties. If this contention be true, the landowner who is so fortunate as to have the use of other taxpayers' money through the Reclamation Bureau in building his reservoir or ditch is exempt from our statutory proceedings for adjudication of his water rights, and the arm of the state is paralyzed in this vital function, at least until such time as the officers of the Federal Government see fit in their superior wisdom to bring action in the Federal Court.

The McCarran Amendment gave consent to join the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights. It provided that when the United States was a party to any such suit, it should be deemed to

have waived any right to plead that the state laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and that the United States should be subject to the judgments, orders and decrees of the court having jurisdiction.

Judicial Interpretation of the McCarran Amendment

The effectiveness of the McCarran Amendment was attacked by the United States. Ken Balcomb, a Glenwood Springs attorney representing Colorado River water users, took on the Department of Justice so effectively that the United States Supreme Court held that the McCarran Amendment meant just what it said: That an adjudication of water rights could be of any substantial segment of a water system and did not have to cover an entire water system, which was insisted on by the United States. It was an obviously correct decision, and if it had gone pursuant to the contentions of the United States Department of Justice, there would have been no tribunal to hear adjudications of waters of the Colorado River which run through seven states.

After passage of the McCarran Amendment, a quiet title suit in federal court in Salt Lake City was turned back to the

local courts by the federal judge there. But Judge Knous of Montrose, the judge in the United States District Court in Denver, retained jurisdiction in the federal court of a quiet title suit by the U.S. Department of Justice in an effort to evade the effect of the McCarran Amendment. This would have been appealed by Denver but for the fact that it finally worked out a settlement of the relationship of Denver's Blue River diversions to the United States Green Mountain Reservoir on the Blue River which resulted in what is known as the Blue River Decree. I was living in an oxygen tent at that time because of asthma, and the actual negotiations were carried on by Harold Roberts assisted by John Dickson. I appeared from time to time under heavy medication, emerging from my oxygen tent for a few hours. The basic decree was worked out when Lee Rankin represented the U.S. in October 1955. An impasse of conflicting views occurred in 1964 when Denver started to fill Dillon Reservoir. When it appeared that a negotiated settlement could not be reached, I contacted Ramsey Clark, a top legal person in the Department of Justice in Washington, and we worked out the sticking point by phone so that a negotiated decree was reached.

This concludes part 2 of this article. Part 3 will appear in the next issue of "Resource Law Notes."

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INSIDE:

New Roles for the Bureau of Reclamation,
Richard W. Wahl, page 4

Reflections on Sixty Years of Water Law Practice,
part 2, Glenn G. Saunders, page 7

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